The Wages of Antiquated Procedural Thinking: A Critique of *Chicago v Morales*

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> The street corner at 79th and Essex does not make any sense. . . . When I leave work these same guys are out there every evening. When you walk down the street, the first thing they do is run up to you. . . .
>
> They watch you. They know where you live. They know what time you leave, what time you come home. I am afraid of them. . . .
>
> I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them.
>
> Ms. D'Ivory Gordon
> Resident of Chicago's 7th Ward[1]

Ms. D'Ivory Gordon, like many of her neighbors, was concerned enough about gang violence in her community to make a public statement about it. She testified in support of a new ordinance designed to help alleviate gang violence in Chicago. The Chicago City Council ultimately adopted the Gang Congregation Ordinance, or as it is more commonly known, "the gang loitering ordinance," in the summer of 1992.[2] The Chicago Police Department specified additional enforcement provisions,[3] and began enforcing the ordinance that same summer.[4] Then, in *Chicago v*

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[1] Chicago City Council Committee on Police and Fire, 1 Transcript of Proceedings 66–67 (May 11, 1992).

[2] Chicago Municipal Code § 8-4-015 (1992).

[3] Chicago Police Department, General Order No 92-4 (1992) (specifying guidelines for enforcement of Chicago's anti-gang loitering ordinance).

[4] Robert Davis, *Special units to police loiterers: city wants to make new gang law hold up in court*, Chi Trib 3 (June 19, 1992) (discussing the enforcement provisions).

Youkhana,[5] the Illinois Appellate Court struck the gang loitering ordinance as facially unconstitutional.[6] The Illinois Supreme Court affirmed this judgment in October of 1997 in *Chicago v Morales*.[7]

This article argues that the *Youkhana* and *Morales* decisions are wrong. These decisions, we argue, demonstrate a commitment to an anachronistic and unduly abstract understanding of individual rights — one fashioned to address political conditions that, by and large, no longer characterize American society. Though the residents of inner city communities increasingly demand law enforcement measures in response to the crime problems they face, the understanding of constitutional criminal procedural rights promoted by *Youkhana* and *Morales* threatens to hamper and retard the development of innovative community policing measures these citizens desire. This result not only denies communities a useful tool to combat violent crime; it also may harm criminal defendants. Because these judicial attempts to control police discretion will fail in predictable ways, it is likely to remit communities to law enforcement strategies that make offenders worse off than if the courts had upheld Chicago's gang loitering ordinance.

This article has four parts. Part I provides more detail about Chicago's gang loitering ordinance — its enactment, enforcement, and purported effects. Part II outlines the *Youkhana* and *Morales* decisions and argues that the reasoning of these two opinions is incorrect. This part shows that the courts relied primarily on an outdated interpretation of *Papachristou v Jacksonville*[8] in order to find that the gang loitering ordinance failed a facial challenge. Part III outlines an alternative way of thinking about protecting rights — an approach that takes into account contemporary social and political circumstances. Finally, Part IV shows how high the stakes are in this debate. Chicago's loitering ordinance is not an isolated example of proactive policing. In fact, many urban areas are involved in sustained projects of law enforcement innovation.[9] While the techniques vary (curfews, loi-

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[5] 660 NE2d 34 (Ill App 1995).

[6] Id at 36.

[7] 687 NE2d 53, 59 (Ill 1997). While this article was in press, the United States Supreme Court granted certiorari in *Morales*. 118 S Ct 1510 (1998).

[8] 405 US 156 (1972).

[9] See Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Georgetown L J 1153 (1998) (noting numerous examples of the "new community policing"); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum L Rev 551 (1997).

tering laws, loitering with intent, order maintenance policing), each enjoys high levels of support among members of minority communities. Those who challenge these laws typically assume erroneously that such communities are opposed to higher levels of policing. Ignoring the reality of this support harms all residents of affected inner city neighborhoods, whether these residents are considered "law breaking" or "law abiding."

I. THE GANG-LOITERING LAW: POLITICALLY DISCIPLINED DISCRETION

In response to voluminous citizen complaints about drive-by shootings, fighting, and open-air drug dealing, Alderman William Beavers, the representative of a predominantly black ward and chair of the Chicago City Council Committee on Police and Fire, sought to introduce an ordinance to restrict gang-related congregations in public ways in 1992. Residents of several of Chicago's high-crime neighborhoods, including D'Ivory Gordon, claimed during Police and Fire Committee hearings that collections of loitering gang members and their hangers-on were frightening and intimidating.[10] Aldermanic committee members testified that their constituents' concerns echoed these claims.[11]

Proponents of the gang loitering ordinance believed that its enforcement could address the problems. Testimony centered on prevention.[12] The council noted that street gangs often exert control over physical space by loitering: they intimidate members of other gangs and non-gang-involved neighborhood residents, preventing entrance into controlled areas.[13] Thus, an obvious solution was a policy that allowed police to break a gang's grip on certain public spaces.

The gang loitering ordinance was passed in the summer of 1992, with the critical support of the leaders of the highest crime (and mostly minority) wards.[14] Specifically, the ordinance empowered police officers who observed a person that officer reasonably believed to be a criminal street gang member loitering in

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[10] Chicago City Council Committee on Police and Fire, 1 Transcript Proceedings 56, 61, 66, 69, 75, 93, 104, 125 (May 11, 1992) (examples of testimony from Chicago residents given in support of the ordinance).

[11] See generally, id.

[12] The comments of former Cook County State's Attorney, Jack O'Malley, are indicative, "I am convinced it's an ordinance along these lines that would really prevent the kind of activity that leads to more violent and serious crime . . . ." Id at 6.

[13] See, for example, comments of Alderman Wojeik, id at 62.

[14] See Dan M. Kahan and Tracey L. Meares, *When Rights Are Wrong*, (unpublished manuscript on file with authors).

a public place with one or more people, to order the group to disperse.[15] If the group refused to disperse, the police officer could arrest those who refused to move on.

The Chicago Police Department did not enforce the law until Police Superintendent Matt Rodriguez signed a general order specifying additional constraints.[16] General Order 92-4, authorized only gang tactical unit officers and other youth officers — those assumed to have the greatest knowledge of Chicago's criminal street gangs — to enforce the new ordinance. The order also required these units to collect detailed information on gangs in the areas where the ordinance was enforced, in order to insure that enforcing officers could work from particular facts rather than from hunches in identifying loitering gang members. General Order 92-4 specified that this information was to be maintained and updated to insure that it included only the names of individuals the Chicago Police Department had probable cause to believe were members of criminal street gangs operating in the relevant district.

In addition, the order specified that the ordinance could be enforced only in certain areas of police districts with demonstrated gang problems. To designate these areas several sources of information were to be used: crime pattern information from the department ICAM program,[17] citizen complaints, and police observations. The knowledge of community residents was perhaps the most important piece of information for designating enforcement areas. District commanders were instructed to consult community residents before designating gang "hot spots."[18] In other words, the enforcement order specifically envisioned a grounded model of policing whereby community residents were partnered with the police to help prevent crime.

Finally, no Chicago Police officer was allowed to enforce the gang loitering ordinance without undergoing special training. Superintendent Rodriguez imposed the training to guard against sweeps of innocent youths and to underscore his mandate that the law be enforced very carefully.[19]

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[15] Chicago Municipal Code § 8-4-015 (1992). The ordinance additionally described in detail the meaning of "loiter," "criminal street gang," and "public place." Finally, the ordinance prescribed punishment for violations.

[16] Chicago Police Department, General Order No 92-4 (1992).

[17] Information Collection of Automated Mapping ("ICAM") is an innovative, geographically based computer system that helps police departments identify crime hotspots. *Mapping Crime*, Chi Sun-Times 3 (Nov 30, 1994).

[18] Chicago Police Department, General Order No 92-4 (1992).

[19] Davis, *Special units to police loiterers*, Chi Trib 3 (cited in note 4).

II. THE GANG-LOITERING DECISIONS: MISPERCEIVING CONTEXT

The *Youkhana* and *Morales* courts ignored these important limits on police discretion. The Illinois appellate court in *Youkhana* claimed that the ordinance was "beyond saving by judicial construction,"[20] and that it "smack[ed] of a police-state tactic."[21] The *Morales* Court was also dismissive of the Chicago Police Department's efforts to guide the discretion of enforcing officers,[22] ignoring the promulgated regulations completely in the analysis of the ordinance's constitutionality. The *Morales* Court concluded that Chicago's ordinance was an arbitrary exercise of the City's police power that violated the federal constitution's guarantee of substantive due process to individuals.[23]

Though the lower court and the Illinois Supreme Court adopted different analyses of the ordinance, the thrust of their opinions is similar. Each court determined that Chicago's gang loitering law was impermissibly vague, thereby failing the constitutional requirement to provide individuals notice of proscribed conduct, and failing to adequately limit arbitrary and discriminatory police enforcement. Because of these concerns, each court drew predictable parallels between Chicago's gang loitering ordinance, and the vagrancy law struck down by the United States Supreme Court in *Papachristou v Jacksonville*.[24]

Papachristou is, of course, well-known. It is commonly referred to in debates about the constitutionality of loitering ordinances.[25] Still, it is worth taking a closer look at the statute struck down in the case and situating the enforcement of the law against the relevant political and social context. The law at issue in *Papachristou* provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common

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[20] *Chicago v Youkhana*, 660 NE2d, 39 (Ill App 1995).

[21] Id at 38.

[22] *Chicago v Morales*, 687 NE2d 53, 64 (Ill 1997).

[23] Interestingly, the *Morales* Court concluded that because it determined that the gang loitering ordinance violated substantive due process, there was no need for the court to analyze whether the ordinance violated specific provisions of the Bill of Rights such as the First, Fourth, or Eighth Amendments. Id at 59.

[24] 405 US 156 (1972).

[25] See, for example, Livingston, 97 Colum L Rev at 551 (cited in note 9); Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Calif L Rev 379 (1995); Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chi Kent L Rev 461 (1993).

> night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.[26]

This particular ordinance was enforced against Papachristou, who, along with her companions, another white woman and two African American men, were charged with "prowling by auto."[27] Jimmy Lee Smith, another defendant in the case, also challenged the validity of the ordinance enforced against him. Smith was arrested between 9 and 10 a.m. on a weekday in downtown Jacksonville while waiting for a friend to bring a car Smith wanted to borrow so that he could apply for a job at a produce company. Smith, it turns out, worked part time for a black political group.

Arrests like these undoubtedly motivated Justice Douglas to write that Florida's ordinance furnished police with "a convenient tool for 'harsh and discriminatory treatment . . . against particular groups deemed to merit their displeasure.'"[28] The groups Douglas had in mind were the poor and unpopular.[29] As Douglas had explained in a famous *Yale Law Journal* article written in 1960, it was naive to defer to the community's approval of loitering and vagrancy laws because those arrested under them typically came "from minority groups" who lacked sufficient political clout "to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police."[30]

Douglas's writings direct attention to the importance of an assessment of the position occupied by the disfavored minorities

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[26] 405 US at 156 n 1.

[27] Id at 158.

[28] Id at 170.

[29] Id. See also William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L J 1 (1960).

[30] Douglas, 70 Yale L J at 13.

against whom Jacksonville's ordinance was enforced. In 1960, when Douglas wrote in the *Yale Law Journal*, only 29.1 percent of the South's adult blacks were registered to vote, in contrast to 61.1 percent of whites.[31] Jim Crow laws, poll taxes, and literacy tests were important components of the South's regime of apartheid.[32] So was violence.[33] During the turbulent civil rights era many blacks were beaten, firebombed, shot and even murdered while the law enforcement agents who had sworn to protect them participated in, tolerated or ignored this violent abuse. The horrific television images of black people in Birmingham, including small children, attacked by police dogs and police officers wielding high pressure water hoses and clubs are indelible and poignant reminders of the South's state-supported violent resistance to civil rights progress. Things were not much better in the urban North, where machine politics of the kind made famous by Richard Daley in Chicago effectively precluded legally-enfranchised African Americans and other minorities from meaningfully influencing the political process. Northern residents of overcrowded, segregated ghettoes of central cities had limited access to essential public institutions, including critical law enforcement resources.

Lack of access to law enforcement resources by minority residents of the South and North manifested in both the under-enforcement and the over-enforcement of the criminal law in minority communities. In the decade prior to the *Papachristou* decision crime had climbed to levels that were higher than at any time since the thirties. Rates of both robbery and property crimes exhibited the sharpest increases during this decade. Importantly, crime was concentrated where poor people, usually people of color, were concentrated — namely, large urban areas. A few crime statistics make the point. In 1967 African Americans comprised over half of the known homicide victims,[34] and an early victimization survey conducted in the mid sixties reveals that non-whites were victimized more often than whites by robbery,

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[31] Paul Kleppner, *Who Voted? The Dynamics of Electoral Turnout, 1870-1980* 116 (Praeger 1982). African American turnout was also disproportionately low, with a 44.9 percent disadvantage in the South and a 20.2 percent disadvantage in the non-South during the same period. Id at 117; see also id generally (explaining dramatic increases in registration and turnout by blacks between 1964 and 1980).

[32] See Steven F. Lawson, *Running For Freedom: Civil Rights and Black Politics in America Since 1941* 22–23 (McGraw-Hill, 1990).

[33] See Kay Mills, *This Little Light of Mine: The Life of Fanny Lou Hamer* (Dutton 1993).

[34] *Bureau of Justice Statistics Sourcebook 1995*, Table 3.130 at 358 (GPO 1996).

rape, aggravated assault, burglary, and auto theft.[35] Even after controlling for socioeconomic status researchers still found that blacks were almost twice as likely to be crime victims as whites in the same low-income group.[36] Surveys also revealed that — like homicide — rape, aggravated assault, burglary, and auto theft were predominantly intragroup offenses.[37] Due to residential segregation, it is likely that minority victims often were victimized by their neighbors.

As the Kerner Commission Report noted, police responded to these problems by doing nothing.[38] Police failure to promote adequate protection and services in disadvantaged minority neighborhoods was a common complaint before the Commission. Of course, the arrest rates referred to above reflect only the serious crimes tracked by the FBI Crime Reports. These reports obscure the even greater number of commonly-occurring disorder offenses. White police officers patrolling urban ghettoes, however, often dismissed violations of sex, drinking and gambling laws along with intraracial simple assaults as "typically Negro."[39]

Just as underpolicing of crime and disorder in many segregated, impoverished urban neighborhoods was a common problem, so was overpolicing in the form of harassment and brutality. Chicago had a particularly noteworthy record of problematic policing. For example, Chicago's civilian death rate at the hands of law enforcement officers between 1968 and 1969 was significantly higher than that of New York, Los Angeles, Philadelphia and Detroit that year, and 75 percent of the civilians slain were black.[40] The explanation? Many of the civilians killed were identified as "fleeing felons."[41] In other urban areas, minorities were subjected

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[35] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of a Crime Free Society* 40 (GPO 1967).

[36] Philip H. Ennis, *Criminal Victimization in the United States: A Report of a National Survey* 31, in The President's Commission on Law Enforcement and Administration of Justice, 2 *Field Surveys* (GPO 1967).

[37] President's Commission, *The Challenge of a Crime Free Society* at 40.

[38] National Advisory Commission on Civil Disorders, Otto Kerner chairman, *Report of the National Advisory Commission on Civil Disorders* 10–11 (Bantam 1968).

[39] Marvin E. Wolfgang, *Crime and Race: Conception and Misconceptions* 50 (Institute of Human Relations 1964).

[40] Metcalfe Blue Ribbon Panel Report, *The Misuse of Police Authority in Chicago* 30 (1972) ("Metcalfe Report").

[41] For an empirical study of police shootings involving black victims, see James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J Crim L & Criminol 707 (1982). See also Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killing*, 9 Harv Blackletter J 1 (1992); *Tennessee v Garner*, 471 US 1, 6 (1984) (holding Tennessee statute allowing police to use deadly force to stop a fleeing felon unconstitutional for failure to meet Fourth Amendment reasonableness standards).

to other types of official abuse by police. Sometimes police exercised their authority to arrest under disorderly conduct, vagrancy and loitering statutes to harass minority youths and adults.[42] The last example should bring to mind the facts of *Papachristou*.

Indeed, *Papachristou* was only one of a series of landmark criminal procedure decisions decided against the background of institutionalized racism.[43] The Court's jurisprudential innovations were clearly geared to responding to this problem.[44] The conception of rights embodied in *Papachristou* and other cases of this time emphasize two interdependent principles: community distrust and discretion skepticism. Each of these principles in the Court's jurisprudence was clearly aimed at counteracting the distorting influence of institutionalized racism on America's criminal justice system.

The 1960s conception of rights showed distrust for communities insofar as it licensed relentless judicial second-guessing of democratic political institutions on the appropriate balance between order and liberty. In an important sense, all rights reflect community distrust because they protect the interests of vulnerable minorities from majority overreaching. What made the 1960s conception of rights uniquely distrustful was its extension of searching judicial scrutiny to basic neighborhood policing techniques that historically had been viewed as advancing the welfare of the community at large.

Our brief review of the existence and effects of widespread minority disenfranchisement in the sixties and prior demonstrates that institutionalized racism fully justified the Court's suspicion of democratic politics. Blacks in Jacksonville, Florida, for example, may not have participated in the adoption by the relevant municipal body of that statute. After its adoption, they also may have been unable to hold the police officers who enforced the law against them accountable through the political process. The same was true in other cities, North and South, in

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[42] For comments from Philadelphia inner city residents on police harassment techniques, see Joseph D. Lohman and Gordon E. Misner, 2 *The Police and the Community: The Dynamics of Their Relationship in a Changing Society* 121–27, in The President's Commission on Law Enforcement and Administration of Justice, 4 *Field Surveys* (GPO 1967). See also Metcalfe Report, *The Misuse of Police Authority in Chicago* at 31 (cited in note 40).

[43] See generally Kahan and Meares, 86 Georgetown L J 1153 (cited in note 9).

[44] See Randall Kennedy, *Race, Crime, and the Law* 76–135 (Pantheon 1997); Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv L Rev 820, 839–40 (1994); Livingston, 97 Colum L Rev at 596–600 (cited in note 9); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L J 1, 5, 50 (1997).

which public order provisions were used to harrass minorities.

Discretion skepticism is the next important feature of *Papachristou* and cases like it. *Papachristou* represents decisions that are *anti-discretion* insofar as they insist that the authority of law enforcement officials to arrest and search must be defined with exacting precision. Again, anxiety about institutionalized racism motivates this jurisprudential innovation. While discretion advances the public interest by giving law enforcers the flexibility to respond to circumstances too numerous and diverse to be addressed in detail by legislative rulemakers, discretion also threatens the public good by giving law enforcers the latitude to abuse their power for personal ends.

The primary check against such abuse is the accountability of law enforcers to the community's political representatives. Before the civil rights movement, however, law enforcement officials were accountable only to representatives of the white majority. Indeed, for precisely this reason, there was every reason to believe that police would use discretion to harass and repress minorities. The Court's requirement that legislatures constrain law enforcement discretion through very clear and specific rules is an anti-delegation doctrine — discretion skepticism prevents legislatures from delegating to politically unaccountable law enforcement agents unlimited authority to discriminate. Moreover, these rules also made it much easier for courts to detect and punish racially motivated abuses of authority.

Given the nature of the problems that then confronted African Americans, and given the Court's own institutional capacities, the development of the conception of rights embodied in *Papachristou* deserves admiration. Nonetheless, it should be clear that both the law at issue in that case, as well as the political and social dynamics of the time, do not map well onto the contemporary circumstances against which *Morales* and *Youkhana* were decided.

To begin, consider the differences between the law at issue in *Papachristou* and the Chicago gang-loitering ordinance. The Jacksonville statue's open-ended language could easily be applied to any person, in any situation, at any time, by any police officer. The language of the Chicago ordinance, in contrast, is designed to cabin police discretion, not enlarge it. Additionally, police department regulations were adopted to further guide the discretion of the small group of officers who were trained to enforce the law.

This comparison is not the only basis for analysis, however. We must also consider political and social changes that have occurred since *Papachristou*. In light of these changes, it should be clear that *Papachristou*'s conception of rights is wrong for the nineties.

African Americans are no longer excluded from the nation's democratic political life. Voter registration levels among African Americans skyrocketed almost immediately after enactment of the Voting Rights Act of 1965. A year after its passage an average of 46 percent of adult blacks in the five states of the Deep South could vote — a 100 percent increase.[45] In Mississippi, the percentage skyrocketed from 7 percent to 67 percent in four years.[46] In all regions of the country African Americans have translated voting power into political representation. Prior to 1973, black representation in the House of Representatives was never higher than 3 percent. In 1991, twenty-four African Americans served in Congress, and four years later that number increased to thirty-nine — 9 percent of all members of Congress.[47] State legislatures around the country show similar impressive gains. Between 1970 and 1983 the number of black state representative doubled.[48] The number of African American mayors increased to 247 from 48 during the same period,[49] and the number of city council members quadrupled.[50] During the 1980s and 1990s, many of America's largest cities have been led by African American mayors.

Minority political progress has led to demographic changes in city police forces. In Chicago, for example, twenty-five percent of sworn officers are African American,[51] and in Washington, D.C., a majority of officers are African American.[52] New York, Washington, D.C., and Los Angeles have all had African American police chiefs who were accountable to African American mayors.[53]

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[45] See Howard Schuman, Charlotte Steeh and Lawrence Bobo, *Racial Attitudes in America: Trends and Interpretations* 28 (Harvard 1985), quoting Stephen F. Lawson, *Black Ballots: Voting Rights in the South 1944-1969* 330 (Columbia 1976).

[46] Shuman, et al, *Racial Attitudes* at 28.

[47] Joint Center for Political Studies, *Black Elected Officials: A National Roster* (UNIPUB 1996).

[48] Id.

[49] Id.

[50] Id.

[51] Kathleen Maguire and Ann L. Pastore, eds, *Sourcebook of Criminal Justice Statistics 1994* table 1.36 at 49 (GPO 1995).

[52] Id.

[53] See Jim Dwyer, *Lie Helps Riot Tensions Fester* NY Daily News 8 (April 7, 1998) (stating that New York Mayor David Dinkins and Police Commissioner Lee Brown are

These data do not, of course, mean that everything produced by the democratic process should automatically escape scrutiny. But minority involvement in the political process should factor into the court's analysis of laws promoted by minority residents themselves.

Perhaps the most important reason why courts should take notice of this phenomenon is that minority communities are using their new political power to take charge of the crime problems that plague their neighborhoods. They are working with their elected officials to establish law enforcement policies that will help them reinforce weak social structures that accompany neighborhood poverty. They are not shunning the police. Instead, they are demanding that police give them the protection they *always* deserved.

Why do they care? The disproportionate concentration of crime in minority communities has also changed dramatically since the 1960s: it has grown substantially worse. By the beginning of the decade, violent crime victimization of minority youth had reached a rate significantly higher than the rates for other racial groups,[54] and today a majority of violent assault victims are black.[55] Minorities — particularly urban ones — are also much more likely than non-minorities to be the victims of non-violent property offenses.[56] And in Chicago, while crime rates nationally have been declining steadily over the last decade, they have increased in the city's highest crime communities[57] — the same communities whose Aldermen promoted the gang loitering ordi-

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both black and served at the same time); Ron Harris, *After the Verdicts,* LA Times 1 (April 18, 1993) (stating that Los Angeles Mayor Tom Bradley and Police Chief Willie L. Williams served at the same time); Frank del Olmo, *Parks is el Hombre, if Not un Hermano LAPD,* LA Times M5 (August 10, 1997) (stating that Williams was Los Angeles's first black chief of police); Frank Clifford, *Bradley Won't Run for 6th Term,* LA Times 1 (Sept 25, 1992) (stating that Bradley was Los Angeles's first black mayor); Keith A. Harriston and Mary Pat Flaherty, *District Police Are Still Paying for Forced Hiring Binge,* Wash Post A1 (Aug 28, 2994) (stating that D.C. Mayor Marion Barry and Police Chief Isaac Fulwood served at the same time); Sari Horwitz, *The Ghosts Are Always Around A Little Bit,* Wash Post W11 (June 30, 1991) (stating that Fulwood is black); and Vernon Loeb, *A Turbulent Era That Defined D.C. Comes to an End,* Wash Post A1 (May 22, 1998) (stating that Barry is black).

[54] Lisa D. Bastian and Bruce M. Taylor, *National Crime Victimization Survey: Young Black Male Victims* 1 (US Dept of Justice, Bureau of Justice Statistics December, 1994).

[55] Cheryl Ringel, *National Crime Victimization Survey: Criminal Victimization 1996: Changes 1995-96 with Trends 1993-96* 4 (US Dept of Justice, Bureau of Justice Statistics November, 1997).

[56] Id at 7.

[57] Cornelia Grumman, *Homicides in West Garfield Park: Like Chipping at a Glacier With an Ice Pick,* Chi Trib 1 (May 24, 1997) (noting that even as violent crime rates are falling in Chicago, murder rates in some inner city neighborhoods continue to climb).

nance.[58]

The anti-community and anti-discretion principles that animate *Papachristou* address problems that no longer characterize American political life. Given the emergence of African American political power in the inner cities, it is no longer plausible to presume that all law enforcement policies adopted by local institutions are designed to oppress minority citizens. These new conditions require a new conception of rights — one that assures that the individuals who have the most at stake make the difficult choices anti-loitering provisions and the like present.

III. TOWARD A NEW CRIMINAL PROCEDURE

A 1990s conception of rights should follow two principles: *community burden sharing* and *guided discretion.* The first determines when courts should relax their individualist distrust of community judgments, while the second assures that the trust afforded community power is not abused.

Consider burden sharing first. The core justification for legal enforcement of rights is the risk that a majority will *not* bear the burdens of its laws but instead will abridge the liberty of a powerless or despised minority. A requirement that sex offenders register with local authorities after being released from prison is a notable example. It is not clear that such a law is unconstitutional, but it is clear that the community should not have the last word on the issue. The majority itself is not burdened by the law, because sex offenders are despised by the community at large and legally excluded from the political process. The community, therefore, cannot be counted on to give adequate consideration to the impact of the law on a sex offender's liberty.

This contemporary example demonstrates that the community distrust principle has continuing relevance. But the assumption that communities will not share in the burdens of law enforcement techniques such as the gang loitering ordinance does not make sense today given the political strength of African Americans and their own legitimate concern to free themselves from the ravages of inner-city crime. Instead of viewing all law-enforcement techniques with suspicion, courts should ask whether the community has internalized the burden that a particular law imposes on individual freedom. If it has, the court should presume that the law does not violate individual rights.

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[58] See Kahan and Meares, (cited in note 14).

Though the gang loitering law burdens the liberty of a minority — gang members and sometimes juveniles — most of whose members might be disenfranchised, it is critical to understand that this minority is by no means despised. Inner-city teens and even gang members are linked to the majority by strong social and familial ties. As sociologist Mary Patillo notes, "residents who express their concern and anger over changes in their community . . . recognize that putting up gates around the entire neighborhood would not rid [it] of the problems [residents] are experiencing because the troublemakers are natives."[59]

Similarly, researcher Sudhir Venkatesh's work demonstrates the numerous ways in which street gangs engage local communities.[60] This empirical work, along with political scientist Michael Dawson's explication of the notion of "linked fate" — the sense in which many African Americans measure their individual well being by assessing the well being of African Americans as a group — supports an argument that minority residents of high crime communities do not desire to cut themselves off entirely from those against whom the gang loitering law was enforced.

In fact, it may be precisely because they care so deeply about these persons that residents of the inner-city prefer relatively mild gang loitering and curfew laws over draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures. Inner-city residents may believe these harsher penalties visit an intolerably destructive toll on the whole community. The pervasive sense of linked fate between the majority of inner city residents and the youths affected by curfews and gang loitering ordinances again furnishes a compelling reason *not* to second guess the community's determination that such measures enhance rather than detract from liberty.

Next is the principle of guided discretion. Thirty years ago, when blacks were formally or functionally disenfranchised, white political establishments could be relied upon — in fact could be expected — to reward law enforcers who harassed minorities. By objecting to the Jacksonville ordinance's vague language and insisting upon specific rules, the Court hoped to limit such abuse by law enforcement. Though their anxiety about the predictable

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[59] Mary Pattillo, *Sweet Mothers and Gangbangers: Managing Crime in a Black Middle-Class Neighborhood*, 76 Social Forces 747 (March 1998).

[60] Sudhir Alladi Venkatesh, *The Social Organization of Street Gang Activity in an Urban Ghetto*, 103 Am J Soc 82 (1997); Sudhir Alladi Venkatesh, *The Gang in the Community* (forthcoming 1998).

response of law enforcers to a vague loitering ordinance made sense thirty years ago, that anxiety is less sensible now that law enforcers in America's big cities are accountable to political establishments that more fairly represent African Americans. Uncompromising hostility to discretion is therefore inappropriate because it interferes with the lines of political accountability that are now being established between minorities and the elected branches of government at the municipal level.

Of course the law should not be completely indifferent to discretion. Even assuming political accountability, unbounded discretion creates a risk that individual law enforcers will be able to disregard the will of the community without detection. It also creates the risk that officials will concentrate burdens on a powerless or despised segment of the community, thereby undermining the principle of burden internalization. The principle of "guided discretion" does not insist on hyper-specific rules, but it does require that communities allocate authority in a manner that minimizes these risks. Chicago's gang loitering ordinance is a good example of a policy that satisfies the guided discretion principle. The law was implemented through regulations that clearly defined "gang member," and "loitering," and clearly specified which officers could enforce the law. Moreover, by requiring community participation in the designation of enforcement areas, the ordinance created a vehicle to *strengthen* political accountability of the police to community residents. Given these safeguards, courts should have upheld the gang loitering ordinance whether or not it satisfied *Papachristou*'s demand for hyper-precision.

IV. THE FULL DIMENSIONS OF THE CONTROVERSY

We have explained why we think *Youkhana* and *Morales* are wrong. We have also offered an alternative conception of rights — one we believe superior to the anachronistic model advanced by the Illinois courts. We now discuss what is at stake in this debate.

While a different and updated conception of rights would allow Chicago to continue to enforce its gang loitering law, the benefits of the analysis go beyond saving an ordinance that was passed by an overwhelming margin of the Chicago City Council. It is useful to look beneath the comments in the Police and Fire hearing to understand why residents of poor, minority neighborhoods favor Chicago's gang loitering ordinance. The answer lies

in the connection between poverty and crime that occurs at the neighborhood level.

In some areas of Chicago, many poor people of color live in conditions of concentrated poverty and unemployment that presage the breakdown of community social processes, which in turn produce crime. Unlike other poor Americans, African Americans who are poor often live in *poor communities*.[61] The overwhelmingly poor communities in which many poor African Americans live are marked by unemployment, family disruption, and residential instability.[62] These conditions disrupt friendship networks, participation in formal organizations, and community-wide supervision of teen peer groups.

Crime is often very high in Chicago's poor, minority neighborhoods.[63] Criminal victimization is unfortunately common, and because the vast majority of crimes against African Americans are committed by other African Americans,[64] the flip side of disproportionate criminal victimization is disproportionate involvement of minorities in the criminal justice system. In 1994, about 40 percent of those on probation in Illinois were black, and 65 percent of the prison population was black in the same year — numbers that no doubt suggest a substantial proportion of Illinois black men under the control of the criminal justice system.[65]

The high proportion of African American men who have been convicted of a crime means the enervation of one of the most potent inducements of law-abiding behavior, namely, the stigma that would otherwise attach to a criminal record. The high num-

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[61] See Robert J. Sampson and William Julius Wilson, *Toward a Theory of Race, Crime and Urban Inequality*, in John Hagan and Ruth D. Peterson, eds, *Crime and Inequality* 37, 41 (Stanford 1995).

[62] This point has been made by numerous authors employing different approaches of evaluation. See, for example, William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* 20–62 (Chicago 1987); Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Harvard 1993); Nicholas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* (Vintage 1991); Alex Kotlowitz, *There Are No Children Here: The Story of Two Boys Growing Up in the Other America* (Doubleday 1991); Christopher Jencks, *Rethinking Social Policy: Race, Poverty, and the Underclass* (Harvard 1992); John M. Hagdorn, *People and Folks: Gangs, Crime and the Underclass in a Rustbelt City* (Lake View 1988); Elijah Anderson, *Streetwise: Race, Class, and Change in an Urban Community* (Chicago 1990).

[63] The crime statistics, income levels, and racial distribution of Chicago neighborhoods can be found and matched up with Chicago police precincts using figures from the following website: http://cgi.chicago.tribune.com/homes/commun/townlist.htm.

[64] Gerald David Jaynes and Robin M. Williams, Jr., eds, *A Common Destiny: Blacks and American Society* (National Academy 1989).

[65] *Bureau of Justice Statistics Sourcebook 1995* at 543, Table 6.26 at 562 (cited in note 34).

ber of men incarcerated means a dwindling supply of positive male role models, and a disproportionately high percentage of single mothers, whose own economic struggles deprive them of the time needed to shield their children from the pressures that draw them into crime. The perception that African Americans are likely to be involved in crime reinforces white distrust and suspicion of *all* African American men. Such attitudes put even law-abiders at a disadvantage in the employment market and hence reduce the return of living a law-abiding life.

Crime thus enfeebles social structures; enfeebled social structures produce more crime; and crime destroys African Americans' wealth and security. This self-reinforcing dynamic constitutes one of the greatest impediments to improving the economic and social standing of African Americans today.

Residents of high crime neighborhoods understand these dynamics. They seek methods to control crime that will not hurt their children and their communities. Chicago's gang loitering ordinance is an example of a policy tool that is a tolerably *moderate* way to steer children away from criminality.[66] The kids whom the police cannot order off the streets today, they realize, are the same ones they will be taking off to jail tomorrow.

Decisions such as *Youkhana* and *Morales* present a cruel irony: the conception of rights advanced in those cases demonstrates respect for individual liberty by destroying ever greater amounts of it. When courts strike down crime-preventive measures such as the ordinance, legislatures inevitably attempt to compensate with even more severe prison terms. Nothing is more destructive of the lives of gang members and the communities they come from than this style of law enforcement. In the end, the gang members the Illinois courts attempted to protect are the ones who lose the most.

The gang members also lose because courts cannot hope to control exercise of police discretion simply by invalidating reasonably specific public order laws like Chicago's gang loitering ordinance. After the law is gone, police discretion remains, and residents of crime-plagued communities will still clamor for better protection. The *Youkhana* and *Morales* courts, along with those who object to the gang loitering ordinance, are mistaken when they argue that the ordinance broadens police discretion.

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[66] For an analogous discussion of drug laws, see Tracey L. Meares, *Charting Race and Class Differeces in Attitudes Toward Drug Legalization and Law Enforcement*, 1 Buff Crim L Rev 137 (1997).

As Professor Livingston so aptly noted, "Elimination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system."[67] By simply invalidating the laws, the courts prevent channels of accountability from being reinforced. In the process, they expose potential defendants to greater abuse.

CONCLUSION

The Illinois Supreme Court's decision in *Morales* is symptomatic of a jurisprudence that has outlived its own political and social presuppositions. If that jurisprudence is not overhauled, Chicago's gang-loitering law will be only the first of many casualties.

[67] See Livingston, 97 Colum L Rev at 593 (cited in note 9) (quoting Jerry L. Mashaw, *Predelegation: Why Administrators Should Make Political Decisions*, 1 J L Econ & Org 81, 97 (1985)).

Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan

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Over the opposition of most of the African American Aldermen who voted on the issue,[1] the Chicago City Council enacted an "anti-gang" loitering ordinance in 1992.[2] In subsequent litigation, the Illinois Appellate Court and the Illinois Supreme Court both ruled unanimously that the ordinance's sweeping, ill-defined terms rendered it void for vagueness.[3] The United States Supreme Court now has granted certiorari to review the Illinois Supreme Court's decision invalidating the ordinance.[4]

Tracey Meares and Dan Kahan contend that the ordinance is sufficiently clear and that the Illinois courts should have deferred to the judgments that prevailed in the political arena.[5] They say that "residents of poor, minority neighborhoods favor Chicago's gang loitering ordinance,"[6] and they excoriate judges for "[i]gnoring the reality of this support."[7] Yet they never offer any evidence to justify their frequently repeated claim that this "reality" exists.[8] The truth is that the anti-loitering ordinance was

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[1] See notes 20–22, 25–29 and accompanying text.

[2] Chicago Municipal Code § 8-4-015 (1992).

[3] *Chicago v Youkhana*, 660 NE2d 34 (Ill App 1995); *Chicago v Morales*, 687 NE2d 53 (Ill 1997), cert granted, 118 S Ct 1510 (1998).

[4] 118 S Ct 1510 (1998).

[5] Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U Chi Legal F 197.

[6] Id at 211.

[7] Id at 199.

[8] See id at 198 (referring to "innovative community policing measures these [inner-city] citizens desire"); id at 198–99 ("curfews, loitering laws, loitering with intent, order maintenance policing . . . each enjoys high levels of support among members of minority communities"); id at 210 ("residents of the inner city prefer relatively mild gang-loitering